FILED
MAR 28 1950
CHARLES ELMORE CROPLEY
CLERK

No. 709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

SAFE HARBOR WATER POWER CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RANDALL J. LEBOEUF, JR.,
CRAIGH LEONARD,
15 Broad Street,
New York, N. Y.,

GEORGE ROSS HULL,
JOHN C. KELLEY,
208 Walnut Street,
Harrisburg, Pa.,
Counsel for Petitioner.

March 27, 1950.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	3
Specification of Errors to be Urged	6
Reasons for Granting the Writ	7
Argument	8
Conclusion	21
Appendix	23

Citations

Cases:

Alabama Power Co. v. *Federal Power Commission*, 128 F. 2d. 280 ..... 8, 15, 16

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197 21

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591 19

First Iowa Hydro-Electric Cooperative v. *Federal Power Commission*, 328 U. S. 152 9

Grand River Dam Authority v. *Grand Hydro*, 335 U. S. 359 8

Knoxville v. *Knoxville Water Company*, 212 U. S. 1 18

Niagara Falls Power Co. v. *Federal Power Commission*, 137 F. 2d. 787 ..... 8, 15, 16

Public Utilities Commission v. *Attleboro Company*, 273 U. S. 283 11

Safe Harbor Water Power Corporation v. *Federal Power Commission*, 124 F. 2d. 800, cert. den. 316 U. S. 663 ..... 5, 11, 14, 15, 20

United States v. *Borden Company*, 308 U. S. 188 12

United States v. *Jackson*, 302 U. S. 628 12

PAGE

Statutes:

Federal Power Act, 49 St. 838, 16 U. S. C. Sec. 791(a) *et seq.*:

Sec. 3(13) 2, 3, 4, 6, 8, 13, 16, 17, 18, 21

Sec. 6 ..... 7, 9

Sec. 14 ..... 4, 13, 18

Sec. 20 ..... 2, 4, 6, 7, 8, 9, 11, 12, 13, 14, 15, 18, 19, 21

Sec. 28 ..... 4, 7

Sec. 201(a) 5, 10

Sec. 205 6

Sec. 206 6

Sec. 208 5

Sec. 313 ..... 19, 21

Miscellaneous:

Hearings before the Committee on Water Power, H. R. 65th Cong. 2nd Sess. 9, 13

H. R. No. 1318, 74th Cong. 1st Sess. 12

Hearings on S. 1725, Committee on Interstate Commerce, 74th Cong. 1st Sess. 12

57 Cong. Rec. 4638 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

SAFE HARBOR WATER POWER CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Safe Harbor Water Power Corporation, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on December 30, 1949.

Opinions Below

The opinions of the Federal Power Commission are found at R. 2727-2795. The opinion of the Court of Appeals (R. 4565-4601) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 30, 1949 (R. 4602). The jurisdiction of this

court is invoked under Section 1254(1) of the Judicial Code (62 Stat. 928, 28 U.S.C. 1254) and Section 313(b) of the Federal Power Act (49 Stat. 838, 16 U.S.C. 825).

Questions Presented

The primary question presented is:

> Do the general regulatory provisions of Part II of the Federal Power Act of 1935, which on its face deals only with the regulation of certain "public utilities" engaged in interstate commerce, authorize the Federal Power Commission to regulate the rates of Safe Harbor Water Power Corporation, a "licensee" under Part I of the Act, and the holder of a license contract issued by the Federal Power Commission in 1930 under the Federal Water Power Act of 1920 (now reenacted as Part I of the Federal Power Act of 1935) which provides for the regulation of the licensee's rates exclusively in accordance with the provisions of Section 20 of Part I of the Act—*i.e.* in the first instance by agreement between the states concerned and by the Federal Power Commission only if such states cannot agree?

If it shall be determined that the jurisdiction of the Federal Power Commission to regulate the rates of licensees is limited to the authority contained in Part I of the Act, further questions arise.

(1) Does Section 20 of the Federal Power Act require that in the regulation of the rates of licensees the rate base employed shall be the "net investment" of the licensee as that term is defined in Section 3(13) of the Federal Power Act, unless such "net investment" shall exceed the "fair value"?

(2) Did the Federal Power Commission correctly apply the formula set forth in Section 3(13) of the Act in determining the "net investment" of petitioner?[1]

(3) Is the statutory requirement of Section 20 of Part I of the Act, that the Federal Power Commission shall have jurisdiction to regulate the interstate rates of licensees only in the event the states concerned are unable to agree, met by the mere failure of the State of Maryland to attempt to engage in cooperative effort with the State of Pennsylvania on the asserted ground that regulation by the Federal Power Commission may be more expedient?

Statutes Involved

The pertinent provisions of Sections 3(13), 14 and 20 of Part I of the Federal Power Act of 1935 and the pertinent provisions of Sections 205 and 206 of Part II of the Federal Power Act of 1935 are set forth in Appendix A (*infra*, pp. 23-26).

Statement

Safe Harbor Water Power Corporation, a Pennsylvania corporation, owns and operates a hydroelectric plant on the Susquehanna River, near Lancaster, Pennsylvania, under a 50-year license issued in 1930 by the Federal Power Commission (R. 3491-3543). Its electric output is sold at wholesale for resale by others in the states of Maryland and Pennsylvania.

Article 1 of petitioner's license (R. 3493) provides in part: "This license is issued for a period of Fifty (50)

[1] The Court below failed to decide this question (R. 4588-89).

years from the date hereof, and in consideration of such license and the benefits and advantages accruing thereunder to the Licensee it is expressly agreed by the Licensee that the entire project * * * shall be subject to all the terms and conditions of this license, including the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto and made a part of this license".

Petitioner's license was issued under the authority of the Federal Water Power Act of 1920. That Act has since been reenacted as Part I of the Federal Power Act of 1935, with certain amendments that are of no significance here. The Act, moreover, as originally written and as reenacted in 1935, although reserving in Section 28 the right of alteration, amendment or repeal, contains the provision "* * * but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder".

Section 20 of the Act, which now appears in Part I, confers jurisdiction upon the Federal Power Commission to regulate the rates charged by licensees for power entering into interstate or foreign commerce only in the event that any of the states directly concerned has not provided a commission to regulate such rates or the properly constituted authorities of the states are unable to agree thereon. Section 20 further provides that the valuation of a licensee's property for ratemaking purposes shall not be in excess of the value or values prescribed in Section 14 of the Act for the purposes of purchase by the United States at the expiration of the license period. The standard set forth in Section 14 is "net investment" as defined in Section 3(13) of the Act, or fair value, whichever is the lower. The Commission has heretofore construed Section 20 to require a "net investment" base.

Part II of the Federal Power Act, enacted some five years after the issuance of petitioner's license, authorizes the Federal Power Commission to regulate the interstate wholesale rates of certain electric utilities, but limits the Commission's regulatory powers "to those matters which are not subject to regulation by the States" (Section 201(a)). It does not in terms fix any basis of valuation for ratemaking purposes other than that which the Commission may properly require (cf. Section 208).

This is the second attempt by the Federal Power Commission to regulate petitioner's rates. On November 9, 1937 the Commission instituted rate proceedings and, after hearings, issued an order on June 11, 1940 requiring petitioner to reduce its rates by approximately $350,000 annually. In that proceeding the Commission expressly relied upon the regulatory powers over licensees conferred upon it by Part I of the Act, although it made no finding that the states of Maryland and Pennsylvania had been unable to agree. The United States Circuit Court of Appeals for the Third Circuit held that disagreement of the states was a prerequisite to the exercise of the Commission's authority and set aside the rate order for want of the necessary jurisdictional finding (124 F. 2d, 800). This Court denied the Commission's petition for certiorari (316 U. S. 663).

On September 1, 1944, the Commission issued a second order instituting the instant rate proceeding. Hearings were held during 1944 and 1945 and, on October 25, 1946, the Commission issued its opinion and order reducing petitioner's rates approximately $627,000 annually (R. 2727-90, 2796-2804). In the findings accompanying its opinion and order, the Commission found that the states of Maryland and Pennsylvania were unable to agree on the regulation of petitioner's rates and that, therefore, the

Commission had regulatory authority over petitioner, a licensee, under Section 20 of the Federal Power Act (R. 2796-98). It also found that petitioner was a "public utility" as that term is defined in Part II of the Federal Power Act, and consequently was subject to the Commission's regulatory powers under Sections 205 and 206 of Part II of the Act (R. 2799).

After an application to the Federal Power Commission for a rehearing of its rate order had been denied, petitioner filed a Petition for Review in the United States Court of Appeals for the Third Circuit (R. 4478-86).

The Court of Appeals affirmed the order of the Commission in its entirety. It held that petitioner was subject to regulation by the Commission both as a licensee under Part I of the Federal Power Act, because the states of Maryland and Pennsylvania had failed to agree on regulation, (R. 4585) and also as a "public utility" under Part II of the Act (R. 4566).

Specification of Errors to Be Urged

The court below erred:

(1) In holding that a licensee, the owner of a hydroelectric project constructed under license from the Federal Power Commission and subject to regulation under Section 20 of Part I of the Federal Power Act, is also subject to regulation as a "public utility" under Part II of the Act.

(2) In holding that in a proceeding brought under Section 20 of the Federal Power Act the Commission is not required to apply the formula set forth in Section 3(13) of the Act in order to arrive at a rate base, and in failing to hold that the Commission's purported application of such formula was incorrect.

(3) In holding that the mere failure of the State of Maryland to attempt to come to an agreement with the State of Pennsylvania on cooperative regulation of petitioner's rates constituted inability to agree within the meaning of the statutory requirement of Section 20 of the Act.

(4) In failing to set aside the order of the Federal Power Commission.

Reasons for Granting the Writ

This is a case of first impression in that the court below is the first court that has been called upon to pass upon the basic question of whether the provisions of Part II of the Federal Power Act are applicable to licensees who are subject to regulation under Part I. We urge that the writ be granted for four reasons:

A. The effect of the decision below, construing Part II of the Federal Power Act to be applicable to licensees, is of great importance because it vitiates the contracts all licensees have heretofore made with the Federal Power Commission providing for the regulation of rates solely in accordance with the provisions of Section 20 of Part I, thus ignoring the statutory prohibitions against alteration or amendment contained in Sections 6 and 28, and because it permits dual regulation of the same rates—by the states under Part I and by the Federal Power Commission under Part II.

B. The decision below, construing Section 20 of the Federal Power Act so as to permit regulation of the rates of licensees by the Federal Power Commission under both Part I and Part II of the Act, is at variance with the views expressed by the Court of Appeals for the Second

Circuit (*Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d, 787, 792, 793) and by the Court of Appeals for the District of Columbia (*Alabama Power Co.* v. *Federal Power Commission,* 128 F. 2d, 280, 293).

C. The decision below, in failing to decide the correct formula to be applied in the determination of "net investment" as that term is defined in Section 3(13) of the Federal Power Act, leaves undetermined an important question of statutory construction affecting all proceedings brought under Section 20 of the Act.

D. The decision below, in construing the mere failure of the State of Maryland to attempt to engage in cooperative regulation of petitioner's rates with the State of Pennsylvania as constituting an inability of the states to agree so as to confer regulatory jurisdiction on the Federal Power Commission, is a misinterpretation of the language and intent of Section 20 of the Act.

Argument

1. From the legislative history of the Federal Water Power Act of 1920, under which petitioner's license was issued, it is abundantly clear that the purpose of the legislation was to promote the development of the nation's water power resources by private investment (*Grand River Dam Authority* v. *Grand Hydro,* 335 U. S. 359, 372, 69 S. Ct. Rep. 114). At the time of its passage, because of legal uncertainties, hydroelectric construction in this country was virtually at a standstill and Congress was determined to end all such uncertainties so that private capital might be tempted to develop the nation's valuable water power resources.

To accomplish this avowed purpose, the Act provided for the development of the nation's water power resources

by "licensees" who would accept from the Government a contract,[2] termed a license, which specifically embodied in the contractual obligations all the terms and conditions of the Act and all the rights and obligations of the licensee to the United States (Section 6). Furthermore, although the Act might be amended, no such amendment could affect the terms of any license previously issued or the rights of any licensee thereunder (Section 28).

This contractual relationship was deemed to be the most satisfactory way of encouraging investment and yet safeguarding the national interest (*First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U. S. 152, 180, note 3, 66 S. Ct. Rep. 906). For, while it guaranteed certainty as to tenure of occupancy during the term of the license, it also guaranteed certainty of obligations and responsibilities, including the price of recapture and the regulation of rates.

Since the Water Power Act was primarily a conservation measure and not a regulatory one, it was deemed advisable to leave the control of rates to the responsibility of the states in which licensees might operate.[3] For this reason, it was provided in Section 20 that in the case of licensees engaged in interstate operations, the Federal Power Commission would have jurisdiction over rates only in the event that the states had not discharged their responsibilities by appointing duly constituted commissions, or in the event that the states concerned were unable to agree. The extent of the Federal power was, therefore, though limited, expressly defined.

In addition, as a further indication of the desire to embody within the license contract all the conditions and obligations to be involved, Section 20, by incorporating

[2] Cf. Hearings before the Committee on Water Power, House of Representatives, 65th Cong., 2nd Sess. (1918), pp. 29-30, 102-3.
[3] ibid pp. 99-100.

the provisions of Section 14, undertook to define the rate base to be employed as "net investment" or "fair value", whichever was lower.

Part II of the Federal Power Act, on the other hand, is a purely regulatory measure. It authorizes the Commission to regulate the wholesale rates of certain "public utilities" engaged in interstate commerce but it limits the jurisdiction of the Commission "to those matters which are not subject to regulation by the states (Section 201(a)). Since the rates of licensees were already, in the first instance, made subject to state regulation under the provisions of Part I of the Act, it seems difficult to assume that Congress intended to superimpose dual regulation by the Federal Power Commission under Part II. Furthermore, the term "public utility" is defined in Part II as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part". The jurisdiction of the Commission over the facilities of licensees is provided in Part I.[4] That jurisdiction, furthermore, is not only statutory, but contractual.

In short, it is impossible to construe the provisions of Part II as being applicable to licensees without ignoring (1) the provisions of Part I requiring the regulation of the rates of licensees by the states concerned, (2) the contract relationship between licensees and the Commission embodying in the license contract the terms of the Act at the time the license was issued, and (3) the plain language of Part II limiting its application to matters beyond the sphere of state control and even then only to "public utilities" referred to in that Part.

The Commission has conceded in its brief filed in the court below that an irreconcilable conflict exists if a licensee should be simultaneously subject to regulation by

[4] Cf. Dissenting opinion of Commissioner Draper (R. 2791-92).

the states under Section 20 and by the Federal Power Commission under Part II. It seeks to resolve the conflict by ousting the states of any jurisdiction whatever. It argues, first, that in view of the decision in *Public Utilities Commission* v. *Attleboro Company,* 273 U. S. 283, the states lack the power to regulate interstate wholesale rates and that Section 20 therefore must be construed to apply only to retail rates. In the alternative, it suggests that Section 20 of the Act must be held to have been repealed by implication with the enactment of Part II.

The court below rejected both arguments advanced by the Commission, but nevertheless upheld the Commission's jurisdiction under Part II on the ground that the regulatory provisions of Section 20, read without the reference to the "net investment" rate base, are so similar to those contained in Part II that it becomes immaterial whether the proceeding is brought under Section 20 or under Part II. We believe all three arguments are demonstrably unsound.

The suggestion that the *Attleboro* decision precludes state regulation was rejected by the Court of Appeals in the first *Safe Harbor* case (128 F. 2d 800) which construed Section 20 to constitute Congressional consent to cooperative regulation by the states. Certiorari was denied by this Court. There is nothing in the *Attleboro* decision that would suggest that Congress lacks the power to confer regulatory jurisdiction upon the states, as was done in Section 20 of the Act.

As the Court of Appeals pointed out in its former opinion, the Compact Clause of the Constitution requires no specific or formal language to evidence the consent of Congress to the making of agreements or contracts between states. The language of Section 20 of the Act is quite adequate to indicate Congressional consent to the

regulation of a licensee's interstate rates by agreement between the states concerned.

The argument in favor of repeal by implication also lacks persuasion. It is of course axiomatic that repeals by implication are not favored. (*United States* v. *Jackson,* 302 U. S. 628, 631, 58 S. Ct. Rep. 390; *United States* v. *Borden Company,* 308 U. S. 188, 198, 60 S. Ct. Rep. 182.) In addition, the suggestion is at variance with the purpose of Part II of the Federal Power Act of 1935 as evidenced by its legislative history. The sponsors and draftsmen of the Act stated repeatedly that there was no intent in Part II to remove from the sphere of state control any powers then being exercised but only to supplement Federal regulation in the sphere where the states were powerless to act.[5] Thus to hold Section 20 repealed by implication is to oust the states by judicial decision from powers theretofore conferred by legislative enactment.

Furthermore, the statutory scheme of the 1935 Act, by segregating in separate parts the provisions relating to licensees from those relating to public utilities, is inconsistent with the theory that anything in Part II may be deemed to repeal any provision of Part I by implication. It is noteworthy that the term "licensee" nowhere appears in Part II whereas in the procedural and administrative provisions of Part III, the terms, "licensee" and "public utility" both appear. The repeated and careful differentiation between "licensees" and "public utilities" throughout the 1935 Act is certainly indicative of congressional intent to segregate the regulatory powers of the Commission over each class. Had Congress intended licensees to become subject to the provisions of Part II, it seems obvious that it would have so stated specifically.

[5] H.R. No. 1318, 74th Cong., 1st Sess. (1935), p. 8; Hearings on Senate Bill S-1725, Committee on Interstate Commerce, 74th Cong., 1st Sess. (1935), pp. 233-34.

Although the court below, as stated above, rejected the Commission's contentions, the rationale of its decision is equally untenable. We have heretofore asserted that the purpose of the Federal Water Power Act was to dispel all uncertainties and define for the term of the license all the licensee's liabilities and responsibilities vis-a-vis the Government. In the matter of rate regulation, the two most significant questions are, of course, first, what body shall possess the regulatory authority and, second, what should be the basis of regulation.

Section 20 of the Act answers both questions. It confers jurisdiction in the first instance upon the states and provides that the rate base shall be that prescribed in Section 14 of the Federal Power Act which is "net investment" as that term is defined in Section 3(13) of the Act.

The court below, however, has construed the language of Section 20 merely to provide a limit for valuation pointing out that Section 20 recites that in the valuation of the property of a licensee for rate-making purposes, "no value shall be claimed by the licensee or allowed by the commission for any project * * * under license in excess of the value * * * prescribed in section 14 hereof for the purposes of purchase by the United States * * *."

When Section 20 is read in the light of the legislative history of the Act, there can be no doubt that it was intended that the rate base to be used in proceedings brought under that Section was to be net investment or fair value, whichever is the lower.[6] This is consistent with the primary aim of the Act to define with certainty all the provisions of the license contract. Since the only types of rate base mentioned in the act are net investment

[6] Cf. Hearings before the Committee on Water Power, House of Representatives, 65th Cong., 2nd Sess., (1918), p. 701; Cong. Rec., 65th Cong., 3d Sess., Vol. 57, Part V, p. 4638.

or one based on fair value, it is apparent that Congress intended prospective investors to be assured that the base to be used for rate-making would be net investment unless fair value was lower.

There is no suggestion that the base the Commission used in this case was fair value or that the fair value would be lower than net investment. In fact, petitioner's offer of proof of fair value was rejected and the rate base employed was original cost less accrued depreciation, as found by the Commission. Petitioner's proof would have indicated that the fair value today of its project far exceeds its cost or the "net investment" (R. 150-155, 2760-61).

Furthermore, the effort of the court below to reconcile the regulatory provisions of Section 20 of Part I of the Act with those contained in Part II fails to resolve the conflict between state and federal control. Whatever may be determined as to the type of rate base required by Section 20, it remains clear that the Section provides for rate regulation in the first instance by the states and by the Federal Power Commission only in the event that the states are unable to agree. This was the decision of the Court of Appeals for the Third Circuit in the first *Safe Harbor* case. If the present decision of the court below is correct, however, the Federal Power Commission, under Part II, will have jurisdiction to regulate the rates of licensees whether or not there is disagreement between the states concerned, and the provisions of Section 20 will be rendered wholly nugatory.

In certain instances, too, the result might be dual and conflicting regulation, for the states might well agree upon the regulation of a licensee's rates, acting under Section 20, while at the same time, the Federal Power Commission might issue an independent and conflicting rate order,

acting under Part II. It is, of course, true and the Commission has so conceded in its brief below, that the very nature of rate regulation requires control by a single authority. The decision of the court below, nevertheless, permits regulation by two authorities. It is hard to believe that in enacting Part II of the Act, Congress had this result in mind. In any event, the importance of the question seems apparent and the necessity for its final determination warrants the granting of this Petition.

Finally, it may be noted that the opinion of the court below clearly indicates that the question is a difficult one, and the solution suggested is the result of an apparent intellectual struggle. The court conceded that its decision was inconsistent with the dicta of two other Courts of Appeals and, in fact, at variance with the views it expressed in the first *Safe Harbor* case (R. 4577). That decision, the court noted, "squints" in the other direction. Also, it may be added that the court below virtually invites review in that it is announced that the determination of jurisdiction under Part I is made only because the "reviewing court" might differ with the views expressed upholding federal jurisdiction under Part II (R. 4578).

2. The court below conceded that its construction of Section 20 is at variance with the dicta of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d, 787, 792, 793, and the Court of Appeals for the District of Columbia in *Alabama Power Co.* v. *Federal Power Commission,* 128 F. 2d, 280, 293 (R. 4577). Both those courts have stated that Section 20 requires the application of a net investment rate base, and the Court of Appeals for the District of Columbia has also indicated that it believes that licensees are subject to regulation exclusively under Part I of the Act.

In the *Niagara Falls* case, Judge Learned Hand stated that "net investment" is "the base upon which its rates are to be calculated if it ever engages in interstate or foreign commerce, §20, 16 U.S.C.A. §813" and that "* * * that definition applies throughout the Act whenever 'net investment' or 'original cost' appears".

In the *Alabama Power Company* case, the court declared: "And the Power Commission, in making valuations for purposes of rate regulation of public utilities—not its licensees—is governed, also, by a different formula than when it makes valuations of the property of a licensee. The formula for valuation of properties of licensees, for rate making purposes, is contained in the provisions of sections of the 1920 Act, which were incorporated into Part I of the Federal Power Act of 1935. Part II of the Power Act is that which deals with public utilities subject to the control of the Federal Power Commission, by reason of being engaged in distribution of electric power in interstate commerce."

In the two cited cases, the courts were considering the "actual legitimate original cost" of the project properties involved for the purposes of determining the legality of the accounting adjustments required by the orders of the Commission. Since under the definition of Section 3(13) the actual legitimate original cost is the primary element in determining "net investment", the views expressed by these two courts carry great significance. Furthermore, although both licensees involved in the two cases were subject to rate regulation by the states in which they operate, if for any reason the utility commissions in such states should cease to exist or cease to have regulatory jurisdiction over the licensees, the Federal Power Commission would have jurisdiction to regulate rates. In consequence, the two courts recognized that

their determination of "actual legitimate original cost" would be the principal element of the "net investment" in the event rate proceedings were ever brought by the Federal Power Commission. The clear expression of opinion by two courts that "net investment" rate base is required in proceedings under Part I of the Federal Power Act therefore amounts to more than mere dicta and establishes a direct conflict, if not in the decisions, at least in the views, of these courts with the determination of the court below.

We submit that this conflict should be resolved. The correct determination of a rate base is of too great importance to remain in the field of indecision.

3. As is indicated by the opinion of the court below (R. 4565), the Commission asserted its jurisdiction over petitioner's rates under both Parts I and II of the Act and took the position that the rate base it applied, consisting of the original cost less accrued depreciation, constituted petitioner's "net investment" as that term is defined in Section 3(13).

Petitioner contended that it is clear from the definition in Section 3(13) that depreciation may be deducted from original cost to arrive at "net investment" only "if and to the extent that" it has been "accumulated during the period of the license from earnings in excess of a fair return * * *." In petitioner's view, the word "earnings" is used in the Act in the accepted sense in which it is used in accounting circles—*i.e.* the excess of income over all operating expenses including annual depreciation expense.

Petitioner contends, therefore, that in order to determine whether depreciation has been accrued out of earnings in excess of a fair return, it is necessary first to

determine what is a fair return for each year during the license period, and then to determine whether petitioner's income after all operating charges, including depreciation expenses for the year, exceeds that sum. To the extent that the income does so exceed that sum, a portion of the depreciation expense may be deemed to be accumulated out of earnings in excess of a fair return.

The Commission, on the other hand, contends that depreciation must be deemed to have been accrued out of earnings in excess of a fair return within the meaning of Section 3(13) if petitioner's income after all operating charges, *except* depreciation expense, provides a fair return. Contrary to the decisions of this Court since *Knoxville* v. *Knoxville Water Company,* 212 U. S. 1, 13, 29 S. Ct. Rep. 148 (1909), the Commission fails to recognize depreciation as an operating expense prior to the determination of earnings or profits.

The court below deemed it unnecessary to determine this question since it had reached the conclusion that Section 20 of the Act does not require the application of the Section 3(13) formula in arriving at a rate base (R. 4588-89). If this petition is granted and this court should determine that Section 20 of Part I of the Act, by incorporating the provisions of Section 14, does provide that in rate proceedings under Section 20 the rate base must be either the lower of "net investment" or "fair value" as specified in Section 14 of the Act, it will become important for this Court to determine the correct application of the formula set forth in Section 3(13). Accordingly, petitioner will urge the merits of its position taken before the court below as briefly outlined above and described in the opinion of the court below (R. 4586-4592). Petitioner will also urge that the application of a 5% rate of return to a depreciated base, in the

case of Safe Harbor, produces an "end result" that is clearly confiscatory. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 64 S. Ct. Rep. 281 (1944). Safe Harbor is a static project. As it cannot reinvest its depreciation reserve in plant, the reserve must be kept intact in low-interest bearing securities or cash. In consequence under the ruling of the court below Safe Harbor will receive a far less return on its project investment than even the inadequate 5% the Commission purported to allow.

4. It is plain from the record that in affirming the Commission's finding that the states of Maryland and Pennsylvania are unable to agree the court below regarded a mere failure on the part of Maryland to make any effort towards cooperative regulation with Pennsylvania as synonymous with an inability to agree. We submit this constitutes a misinterpretation of Section 20 of the Act which clearly requires a showing of *inability*, and not mere failure, to agree as a prerequisite to the exercise of rate regulatory powers by the Federal Power Commission.

There was clearly no evidence, much less substantial evidence as required by Section 313 of the Act, of inability to agree. At best there was evidence that the states had failed to agree because Maryland chose to circumvent the Act by urging the Federal Power Commission to act in the interests of expediency.

Examination of the only evidence in the record before the Commission upon which its finding of disagreement between the states was based discloses two letters, both quoted by the court below (R. 4579-82). The first is signed by four attorneys who describe themselves as "counsel for certain intervenors in an investigation now pending before the Maryland Public Service Commission of the rates for electric service charged by the Consolidated Gas

Electric Light and Power Company of Baltimore." It obviously cannot be regarded as an expression of the policy of the state of Maryland.

Furthermore, it recites the understanding of the wri ers that "joint hearings with regard to these rates are contemplated by the Maryland and Pennsylvania commissions". It requests action of the Federal Power Commission in view of its "clearer jurisdiction" and "superior facilities for making these determinations". Patently this letter evidences no inability of the states to agree.

The other letter is from the Chairman of the Maryland Public Service Commission and recites in part, *"while the state commissions are ready to engage in cooperative regulation* and the opinion of the Circuit Court [*i.e.,* in the first *Safe Harbor* case] indicates state jurisdiction, • • • we understand that the Federal Power Commission is prepared to pursue the matter to a conclusion in much less time than probably would be required by state action."

In other words, the suggestion of the Maryland Commission is merely that the statutory procedure required by the Federal Power Act be ignored in the interests of expediency. It cannot be construed as inability to agree, since readiness to engage in cooperative regulation with Pennsylvania is admitted. That Pennsylvania has at all times taken the position that it is ready to cooperate with Maryland is conceded in the court's opinion (R. 4584).

It should be evident that in conferring authority upon the states to regulate the interstate rates of licensees by agreement Congress intended that an actual effort to agree should be made. The opinion of the court below permits the representatives of the public utility commission of *one* state, irrespective of the avowed willingness of the other state to cooperate, to invalidate the purpose of the statute merely because such state deems it expedient. In addition,

it ignores the statutory command that findings must be supported by substantial evidence. (Sec. 313(b) Federal Power Act, 49 Stat. 860, 16 U.S.C. 825 l; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229, 59 S. Ct. Rep. 206.)

Finally, even if it should be determined that the statutory requirement of inability to agree has been met by the mere failure of the State of Maryland to make any effort to agree with the State of Pennsylvania, the decision of the court below should be reversed because (1) whatever jurisdiction the Commission has over petitioner's rates is derived from Section 20 of Part I of the Federal Power Act, (2) Section 20 requires the application of a "net investment" rate base and (3) the Commission incorrectly applied the formula of Section 3(13) in purporting to determine the "net investment" of petitioner for rate-making purposes.

CONCLUSION

It is important that this Court resolve all doubts as to the applicability of Part II of the Federal Power Act to licensees, and as to the respective powers of the Federal Power Commission and the state commissions over rates of licensees. It is further important that this Court determine the rate base which may be applied in proceedings under Section 20 of Part I of the Federal Power Act. For these reasons it is respectfully requested that this Writ of Certiorari be granted.

RANDALL J. LEBOEUF, JR.,
CRAIGH LEONARD,
GEORGE ROSS HULL,
JOHN C. KELLEY,
Counsel for Petitioner.

March 27, 1950.

APPENDIX

Excerpts from the Federal Power Act

"SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit: * * * (13) 'net investment' in a project means the actual legitimate original cost thereof as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission', plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. * * *

"SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, * * * upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered

into by the licensee with the approval of the Commission. * * *

"SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall

be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act. * * *

"SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. * * *

"SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. * * *"

FILE COPY

Supreme Court, U. S.
FILED
MAY 10 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 709

SAFE HARBOR WATER POWER CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR SAFE HARBOR WATER POWER CORPORATION, PETITIONER

RANDALL J. LEBOEUF, JR.,
CRAIGH LEONARD,
15 Broad Street,
New York, N. Y.,

GEORGE ROSS HULL,
JOHN C. KELLEY,
208 Walnut Street,
Harrisburg, Pa.,
Counsel for Petitioner.

May 9, 1950.

INDEX

	PAGE
STATEMENT	1
1. Interpretation of the Act	2
2. The Conflict Between Parts I and II	6
CONCLUSION	9

Citations

Cases:

Alabama Power Co. v. *Federal Power Commission*, 128 F. 2d 280	8
Knoxville v. *Knoxville Water Company*, 212 U. S. 1	8
Niagara Falls Power Co. v. *Federal Power Commission*, 137 F. 2d 787, cert. den. 320 U. S. 792	8
Public Utilities Commission v. *Attleboro Steam & Electric Co.*, 273 U. S. 83	5
Safe Harbor Water Power Co. v. *Federal Power Commission*, 124 F. 2d 800, cert. den. 316 U. S. 663	5

Statutes:

Federal Power Act, 49 Stat. 838, 16 U. S. C. Sec. 791(a) *et seq.*:	
Sec. 3(13)	8
Sec. 10(d)	7
Sec. 20	5, 7, 8
Sec. 28	9
Sec. 201(a)	5
Sec. 305(a)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 709

SAFE HARBOR WATER POWER CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR SAFE HARBOR WATER POWER CORPORATION, PETITIONER

Statement

The brief for the Federal Power Commission, filed in opposition to Petitioner's brief accompanying its petition for certiorari in this proceeding, requires, in the opinion of Petitioner's counsel, a short reply. Although the Commission asserts that no questions of general importance are presented here, it is submitted that the very cogency of the Commission's arguments indicates that important questions are involved which should be settled by the decision of this Court. The Court below has invited review (R. 4578) and has conceded that its views are at variance

with those expressed by two other courts (R. 4577). In addition, the indecision of the Commission itself, in proceeding against the Petitioner in the first instance under Part I alone (cf. Respondent's Brief, pages 4 and 5) and in proceeding here under both Parts I and II, indicates not only the necessity for clarification of the question whether Part II is applicable to licensees engaged in interstate operations, but also that there is serious doubt as to the inability of the states to agree so as to confer regulatory jurisdiction on the Commission under Part I.

1. Interpretation of the Act.

(a) Respondent relies upon an excerpt from H. Rep. No. 1318, 74th Cong., 1st Sess. to support its argument that the legislative history of the Federal Power Act of 1935[1] (the Act) indicates a Congressional intent to include licensees within the regulatory provisions of Part II. This excerpt, which appears in the analysis of Part III of the Act, is the only scrap of evidence in the entire legislative record which might be deemed to suggest such a conclusion, and is at variance with every other indication of the intent that licensees should be regulated under Part I exclusively.

Furthermore, a reading of a portion of the testimony at the hearing on Senate Bill S-1725, held April 19, 1935 before the Senate Committee on Interstate Commerce (74th Congress, 1st Sess.) discloses that the change of language in Sec. 305(a), to which the quoted excerpt referred, was based upon the testimony of Dozier A. DeVane, Solicitor of the Federal Power Commission. To understand the significance of Mr. DeVane's testimony, a further amplification than that presented by the Respondent is required.

1. 49 Stat. 838, 16 U.S.C. 791 a, et seq.

At the start of his testimony (233), Mr. DeVane attempted to explain the structure of the bill then before the Senate (S. 1725). He explained that pages 70 to 104 were amendments to the Federal Water Power Act and were included in Title II, and that a "second title II" commenced at page 104 and provided for the regulation of the transmission and sale of electric energy in interstate commerce. Title III contained "administrative provisions applicable to both titles II beginning on pages 78 and 104." Mr. DeVane was asked if the proposed amendments to the Water Power Act were necessary in order to make Title I of the Bill (dealing with public utility holding companies) effective. The following discussion ensued: (233-234)

> (Senator Hastings) "I thought it was all one subject.
>
> "The Chairman: No. We have been dealing entirely up to this time, I mean, with the holding company situation, Title I of the bill.
>
> "Mr. DeVane: It is all one subject. They all relate to the electrical industry. But Title I of the bill deals with the holding company side of the matter and the second Title II deals with operating companies.
>
> "Now, in that connection, I should like to say that among the operating companies are those companies that now have licenses from the Federal Power Commission under the Federal Water Power Act. There are certain amendments that should be made to that act. When you begin to deal with holding companies on the one side, and with operating companies on the other, and you have as a part of those operating companies licensees under the Federal Water Power Act, it appeared obvious that the time to take care of the necessary amendments

to the Federal Water Power Act was the same time."

It seems clear that a reading of Mr. DeVane's testimony in full indicates precisely the opposite conclusion from that which the Respondent would reach. Mr. DeVane quite evidently was only attempting to explain why it was appropriate to embody amendments of the Federal Water Power Act in the one Bill. He did not say that licensees are public utilities, but only that "among the operating companies" are licensees and that, therefore, it was an appropriate time to amend the Water Power Act relating to licensees.

Mr. DeVane clearly recognized two types of operating companies, one type being licensees under the Federal Water Power Act and the other type being operating companies as to which the regulatory provisions of "second Title II" was directed. His intention to deal with regulation of licensees by making the "necessary amendments to the Federal Water Power Act" is abundantly clear. Conversely there was no intention to deal with licensees under Part II.

It is furthermore noteworthy that Mr. DeVane, who, as Solicitor of the Commission, had been largely instrumental in the draftsmanship of the Bill, failed to suggest any change in the regulatory provisions of Section 20 of the Water Power Act. Since, in his position, he must undoubtedly have been aware that the jurisdiction of the Federal Power Commission to regulate the interstate rates of licensees was expressly conditioned in Section 20 upon a failure of the states to provide regulatory machinery or upon an inability to agree, it is inconceivable that had he intended to suggest that the Commission have unconditional authority to regulate the rates of such

licensees under Part II, he would not have proffered an appropriate amendment.

(b) Petitioner and Respondent are in accord that the purpose of the enactment of Part II of the Act was to close the gap indicated by the decision of this Court in the *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83. For this reason, the declaration of policy expressed in Section 201(a) establishes that federal regulation is to extend only "to those matters which are not subject to regulation by the States."

Licensees, who are engaged in operations in more than one state, are, however, expressly made subject to regulation by such states under Section 20 of the Act. *Safe Harbor Water Power Co.* v. *Federal Power Commission,* 124 F. 2d 800, cert. den. 316 U. S. 663. There is, therefore, no regulatory gap with respect to such licensees and the regulation of such licensees is apparently a matter "subject to regulations by the States" and consequently without the express scope of Part II.

(c) Respondent attempts to refute Petitioner's emphasis on the careful use of the word *Part* throughout the Act with the observation that Petitioner's contention is based upon the assumption that regulation under Parts I and II is mutually exclusive. In fact Petitioner's contention is that Parts I and II must be mutually exclusive to be consistent.

Respondent, moreover, is simply begging the basic question as to whether or not the two Parts are mutually exclusive. Petitioner contends that the draftsmanship in segregating in Part I the regulatory provisions dealing with licensees, and in segregating in Part II the regulatory provisions dealing with public utilities, and at the same time combining in Part III the administrative provisions

dealing with both categories, but stating in each instance which of the sections of Part III are to apply to both licensees and public utilities, indicates an intent that Parts I and II should be mutually exclusive. No other conclusion is consistent with the language employed.

2. The Conflicts Between Parts I and II.

(a) Respondent concedes a potential conflict between federal and state regulatory authority if Parts I and II should both be held applicable to licensees engaged in operations in more than one state. It suggests, however, that determination of this issue should be deferred since federal regulation is here allegedly established by the failure of the states to agree. Petitioner believes that the question should be resolved because of its obvious importance in the field of Federal Power Commission regulation and further because there is no substantial evidence to support the Commission's conclusion that the States of Pennsylvania and Maryland, in this instance, have been unable to agree.

Respondent seems to argue that because no action was taken by the two states concerned after its first order reducing Petitioner's rates was set aside by the Federal Power Commission, it is indicated that the two states could not agree as to cooperative regulation. It should be noted that the period between the termination of the first proceeding and the institution of the present case on September 1, 1944 were war years. During that period the manpower and the energies of the State Commissions were directed largely to activities directly concerned with the war effort. At best, however, the inaction of the states would indicate a failure to agree with the regulatory theories of the Federal Power Commission. Nothing in the Federal Power Act of 1935 or in its predecessor, the

Federal Water Power Act, indicates that agreement in regulatory philosophies of the states with that of the federal body is mandatory.

Furthermore, even if, as Respondent suggests, the states should remain inactive for a period of years, the result would not be to "emasculate" rate regulation under Section 20. Safe Harbor is a wholesaler of electric energy. The interest of the states in its rates is limited to the effect that such rates may have upon the rates of its customers who are engaged in serving the ultimate consumer in the states concerned. Inaction by the State Commissions would, therefore, mean only that the State Commissions were satisfied with the rates to the ultimate consumer in their respective jurisdiction. This is certainly a matter within the prerogative of the State Commissions.

Furthermore, any excess earnings which Safe Harbor might realize are subject to regulation by the Commission in accordance with Section 10(d). Inaction by the states over a period of years would, therefore, not emasculate rate regulation under Section 20, but would, on the contrary, foster the Congressional intent to allow the states to protect the consumers within their own jurisdiction and yet to prevent excessive profits to licensees by means of federal control.

The primary question, however, may be resolved by the plain language of the Act. It requires the inability of the states to agree as a condition precedent to federal jurisdiction. Inability to agree is not shown, as here, by the continued and reiterated offer of one state, Pennsylvania, to cooperate and by the admission of the other state, Maryland, that "the State Commissions are ready to engage in cooperative regulation" (R. 4584).

(b) Whether or not Section 20 of the Act requires a "net investment" rate base in proceedings, which the Commission is authorized to conduct under that Section, is a question of too great importance to remain longer unresolved. Petitioner, for the reasons stated in the argument accompanying the petition for certiorari, contends that the net investment rate base, as defined in Section 3(13) of the Act is required in Section 20 proceedings. This is in accordance with the views of two U. S. Courts of Appeals. *Niagara Falls Power Company* v. *Federal Power Commission,* 137 F. 2d 787, 792, 793, cert. den. 320 U. S. 792. *Alabama Power Company* v. *Federal Power Commission,* 128 F. 2d 280, 293. The court below held otherwise. A final determination of this question by this Court should, it is submitted, be made at the earliest opportunity.

If a "net investment" rate base is required in Section 20 proceedings, it is submitted that without willfully distorting the language of Section 3(13) it cannot be argued that normal depreciation charges accrued in the depreciation reserve may be deducted in determining net investment unless such charges have been accumulated out of earnings, after depreciation expense, in excess of a fair return.

Petitioner's argument that different accounting principles prevailed in 1920 when the Federal Water Power Act was enacted is utterly untenable. Depreciation has been recognized as a proper deduction from operating expenses to arrive at "earnings or profits" since the decisions of this Court in the *Knoxville* v. *Knoxville Water Company,* 212 U. S. 1, 13, 29 S. Ct. Rep. 148 (1909). Furthermore, it is so specifically recognized in Regulations 16 and 17 of the Rules and Regulations governing the administration of the Federal Water Power Act, 3rd

Revised Edit., in effect at the time the Safe Harbor's license was issued in 1930 and specifically incorporated in and made a part of such license contract. Inviolability of the license contract is protected both by Section 28 of the Act and Article 27 of the license (R. 3508(a)).

CONCLUSION

It is respectfully submitted that the petition for a Writ of Certiorari should be granted.

RANDALL J. LEBOEUF, JR.,
CRAIGH LEONARD,
GEORGE ROSS HULL,
JOHN C. KELLEY,
Counsel for Petitioner.

May 9, 1950.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
A. Safe Harbor	3
B. Prior proceedings	4
C. Present proceedings	5
Argument	8
Conclusion	24

CITATIONS

Cases:

Adams v. *United States*, 319 U. S. 312	22
Alabama Power Co. v. *F.P.C.*, 128 F. 2d 280	19
Re Consolidated Gas Electric Light and Power Company of Baltimore, 61 P.U.R. (N.S.) 94	6
Re Consolidated Gas Electric Light and Power Company of Baltimore, 67 P.U.R. (N.S.) 144	6
Edward's Lessee v. *Darby*, 12 Wheat. 206	22
F.P.C. v. *Hope Natural Gas Co.*, 320 U. S. 591	19
Jersey Central Co. v. *F.P.C.*, 319 U. S. 61	12
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	15
Niagara Falls Power Co. v. *F.P.C.*, 137 F. 2d 787, certiorari denied, 320 U. S. 792	11, 19
Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 295	22
Pennsylvania Gas Co. v. *Public Service Commission*, 252 U. S. 23	15
Pennsylvania Public Utility Commission v. *F.P.C.* (C.A.D.C.) No. 10239	6
Pennsylvania Water & Power Co. v. *F.P.C.* (C.A.D.C.) Nos. 10236, 10531	6
Re Pennsylvania Water & Power Company, F.P.C. Opinions Nos. 173, 173a	6
Prudential Insurance Co. v. *Benjamin*, 328 U. S. 408	14
Public Service Commission v. *Attleboro Steam & Electric Co.*, 273 U. S. 83	12
Rochester Telephone Corp. v. *United States*, 307 U. S. 125	15
Re Safe Harbor Water Power Corporation, 2 F.P.C. 182, 34 P.U.R. (N.S.) 236	5

Cases—Continued

	Page
Safe Harbor v. *F.P.C.*, 124 F. 2d 800, certiorari denied, 316 U. S. 663	5, 11, 15
Safe Harbor v. *United States*, 37 F. Supp. 9, appeal dismissed, 313 U. S. 546	11
United States v. *American Trucking Assns., Inc.*, 310 U. S. 534	22

Statutes:

Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Holding Company Act of August 26, 1935, c. 687, 49 Stat. 803, 838, 16 U. S. C. 791a, *et seq.*):	
Part I	9
Section 3(13)	18, 19, 20, 21, 23
Section 10(d)	22
Section 14	18
Section 20	9, 12, 14, 15, 18, 19
Section 28	23
Part II	9
Section 201(a)	11
Section 201(b)	9
Section 201(e)	9
Section 201(f)	10
Section 205	14, 18
Section 206	14
Section 206(a)	18
Part III	12
Section 305(a)	10, 11
Section 313(b)	15
41 Stat. 1063	21

Miscellaneous:

Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries*, 14 Geo. Wash. L. Rev. 53, 78	15
18 C. F. R. (1949 ed.) 35.20, 35.3 (Commission's Rules and Regulations)	11
First Annual Report to Congress, H. Doc. No. 242, 67th Cong., 2d sess., pp. 10-11, 57, 58	21, 22
Hatfield, *Modern Accounting*, (1915), pp. 290-291	21
Hearings before the House Committee on Water Power, 65th Cong., 2d sess., pp. 4, 5, 34-35, 41, 42-43	21, 22
Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st sess. on S. 1725, pp. 233-234	11

Miscellaneous—Continued

Page

H. Rep. No. 1318, 74th Cong., 1st sess., pp. 7, 24, 31 . . 11, 12, 22
H. Rep. No. 1903, 74th Cong., 1st sess., pp. 56 and 75 . . . 11
Mason, *Principles of Public-Utility Depreciation* (1937), p. 104 21
May, *Twenty-Five Years of Accounting Responsibility* (1936), p. 164 21
S. Rep. No. 621, 74th Cong., 1st sess., p. 17 12

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 709

SAFE HARBOR WATER POWER CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Federal Power Commission (R. VI 2727-2795) [1] is reported at 5 F. P. C. 221 and 66 P.U.R.(N.S.) 212. The opinion of the Court of Appeals for the Third Circuit (R. XI 4565-4601) is reported at 179 F. 2d 179.

---

[1] Since the printed record is voluminous, consisting of eleven volumes, we shall cite the volume (in roman numerals) as well as the page.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1949 (R. XI 4602). The petition for a writ of certiorari was filed on March 28, 1950. The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act and under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the interstate wholesale rate for electric energy charged by petitioner, which owns and operates facilities for the transmission and sale for resale of electric energy in interstate commerce and holds a license under Part I of the Federal Power Act, is, in the circumstances of this case, regulable by the Federal Power Commission under the rate regulation provisions of both Part I and Part II of the Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 803, 838, 16 U. S. C. 791a, *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

STATEMENT

On February 3, 1947, Safe Harbor Water Power Corporation petitioned the Court of Appeals for the Third Circuit to review the Federal Power Commission's order of November 4, 1946 (R. XI 4478-4486), in which the Commission had found that Safe Harbor's interstate wholesale rate for electric

energy was excessive and had required a reduction so as to yield a 5% return after allowance for all operating expenses, including taxes and depreciation. This reduction on the basis of 1943 operations amounted to $627,551 (R. VI 2727-2804). The Court of Appeals affirmed the Commission's order (R. XI 4565-4601). The pertinent facts may be summarized as follows:

A. *Safe Harbor:* Safe Harbor is a Pennsylvania corporation which owns and operates a large hydroelectric project, consisting of a dam, powerhouse and transmission facilities, located on the Susquehanna River near Lancaster, Pennsylvania, under a 50-year license issued in 1930 by the Commission (R. I 28, 29, 226). Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) owns all of Safe Harbor's non-voting capital stock and 50% of its voting capital stock; the remaining 50% of the voting capital stock is owned by Pennsylvania Water & Power Company (Penn Water) (R. I 35-36, 228).

Under a contract made in 1931 and expiring in 1980, Safe Harbor sells its entire output to its parent companies, two-thirds to Consolidated and one-third to Penn Water (R. I 232). In return, petitioner receives annual payments in amounts determined by a formula designed to provide it with a fixed rate of return on investment, after defraying its operating expenses, including its taxes and an allowance for depreciation (R. I 233). These pay-

ments are independent of the amount of power and energy delivered, and regardless of any contingency that may arise never fall below the amount required to pay bond interest and sinking-fund charges in addition to operating expenses (R. I 233).[2]

The electric power resources of Safe Harbor, Consolidated and Penn Water are tied together, coordinated and operated as a regional, interconnected and integrated power-supply system serving Baltimore, Maryland, other areas in Maryland and Pennsylvania, the District of Columbia, and the Pennsylvania Railroad's electrification requirements for its main line south of Perryville, Maryland, to Washington, D. C., and generally west of Thorndale, Pennsylvania, to Harrisburg, Pennsylvania (R. I 227-228, II 525). This interconnected system is so operated as to obtain its supply of power and energy at the lowest over-all cost and the output of each generating facility is utilized at such times and in such amounts as to produce economy of operation and reliability of service (R. I 40, 230-231).

B. *Prior Proceedings:* The Commission, on its own motion, instituted its first rate proceeding against Safe Harbor in 1937 (R. VI 2728). Follow-

[2] Safe Harbor is also a nominal party to Penn Water's contracts for the supply of electric energy to Pennsylvania Power & Light Company and Philadelphia Electric Company and to a Consolidated-Penn Water contract with the Pennsylvania Railroad, but makes no sales under these contracts (R. I 234, VIII 3479-3481).

ing hearings in 1939, the Commission issued a rate reduction order on July 11, 1940, relying exclusively on the authority of Part I of the Federal Power Act (R. VI 2728-2729). *Re Safe Harbor Water Power Corporation,* 2 FPC 182, 34 P.U.R. (N.S.) 236. The rate reduction ordered, amounting to approximately $350,000 annually, would have provided a 6% return (R. VI 2729). On review, the Court of Appeals for the Third Circuit set the Commission's order aside on the single ground that the Commission was without jurisdiction under Part I, in the absence of a finding that "the States of Pennsylvania and Maryland by their respective commissions were unable to agree on the service to be rendered by the power company or on the rates or charges of payment therefor." *Safe Harbor* v. *F.P.C.,* 124 F. 2d 800, 808. This Court denied certiorari. 316 U. S. 663.

C. *Present Proceedings:* On August 31, 1944, more than two years after termination of the first proceeding, the Federal Commission received a petition from the Maryland Public Service Commission [3] requesting it to proceed to determine the reasonable rates to be charged by Safe Harbor and

---

[3] Earlier, on August 14, 1944, the Federal Commission received a joint petition from the Mayor and City Council of Baltimore, Maryland, and others, requesting it to determine "the just and reasonable wholesale rates charged for electric energy which is sold * * * in interstate commerce" to Consolidated by Safe Harbor and Penn Water for resale. (R. I 7-9, XI 4579-4581.)

Penn Water for energy sold to Consolidated (R. I 6-7, XI 4581-4582).[4]

On September 1, 1944, the Federal Commission initiated the present proceeding (R. I 2-4).[5] After extensive hearings, the Commission on November 4, 1946, issued its opinion and order (R. VI 2727-2804). After finding the States "unable to agree" on the regulation of petitioner's rate, the Commission asserted jurisdiction to regulate it under Section 20 of Part I which relates *inter alia* to rates of licensees whose power enters interstate commerce (R. VI 2740-2741, 2796-2798). The Commission also asserted jurisdiction under Section 206(a) of Part II on the ground that since petitioner owns and operates facilities for the transmission and sale

---

[4] The importance of the interstate rates to Consolidated's retail rates to consumers, which were at the time under investigation by the Maryland Commission, is referred to by that Commission in its opinions in its investigation. *Re Consolidated Gas Electric Light and Power Company of Baltimore*, 61 P.U.R. (N.S.) 94, 102-103; *Re Consolidated Gas Electric Light and Power Company of Baltimore*, 67 P.U.R. (N.S.) 144, 149-150.

[5] Simultaneously, the Commission initiated a separate investigation of Penn Water's rates. On January 5, 1949, the Commission issued an order directing Penn Water to reduce its rates by about $2,000,000 per year. *Re Pennsylvania Water & Power Company*, FPC Opinions Nos. 173, 173a (rehearing denied). Petitions to review these orders are now pending in the United States Court of Appeals for the District of Columbia Circuit. *Pennsylvania Water & Power Co.* v. *F.P.C.* (C.A.D.C.) No. 10236; *Pennsylvania Public Utility Commission* v. *F.P.C.* (C.A.D.C.) No. 10239; see, also, *Pennsylvania Water & Power Co.* v. *F.P.C.* (C.A.D.C.) No. 10531 (petition to review Commission's order of October 27, 1949, prescribing rate schedules).

at wholesale of electric energy in interstate commerce, it is a "public utility" within the meaning of that Part (R. VI 2742-2746, 2798-2799). The Commission further found that Safe Harbor's status as a licensee under Part I does not exempt it from regulation under Part II and that no conflict results from regulation under both Parts I and II (R. VI 2746-2759).

In fixing the rate, the Commission found the actual legitimate original cost of petitioner's property to be $30,141,176 for the year 1943 (R. VI 2762, 2801-2802). The Commission added $220,000 for working capital and deducted the reserve for depreciation per books for 1943 in the amount of $1,575,674 (R. VI 2801, 2802).[6] On the resulting rate base of $28,785,502, the Commission allowed an annual return of 5% (or a return of $1,439,275), which it found to be "fair and reasonable" (R. VI 2783, 2784, 2804). Based on these findings, the Commission, using 1943 as illustrative, concluded that Safe Harbor's rate was excessive by $627,551 (R. VI 2802-2803).

After the Commission denied its petition for rehearing and stay (R. VI 2805-2868, 2869-2870), petitioner sought review of the Commission's order in

---

[6] Although the Commission also found that petitioner's depreciation reserve was deficient by about $3,000,000, it did not deduct the full amount of accrued depreciation because only the existing reserve had been recouped in rates (R. VI 2780, 2782).

the Court of Appeals under Section 313(b) of the Act (R. XI 4478-4486). The court held that, although petitioner is a licensee under Part I, it also is a public utility under Part II since it owns and operates jurisdictional facilities and that its rate is accordingly subject to regulation by the Commission under Part II (R. XI 4570-4572). The court went on to approve the Commission's finding that Maryland and Pennsylvania were "unable to agree," and held that this finding authorized the Commission to regulate petitioner's wholesale interstate rate as a licensee under Section 20 of Part I (R. XI 4576, 4578-4585). The court further upheld the Commission's determination that it had jurisdiction to regulate the rate under both Parts, finding that the formulae for rate regulation provided in Parts I and II were "substantially identical" (R. XI 4574), and so treating it as unnecessary to resolve the alleged conflicts resulting from regulation under both Parts (R. XI 4574). The court concluded that the rate reduction ordered by the Commission was supported by substantial evidence, adding "were we reviewing the matter *de novo* we would reach the same conclusions as those expressed by the Commission" (R. XI 4600, 4585-4601). Accordingly, it affirmed the order of the Commission (R. XI 4601).

ARGUMENT

Petitioner does not contest the Commission's finding, upheld by the court below, that Safe Harbor's sales of electric energy are at wholesale in inter-

state commerce;[7] nor does it deny that if provisions of Part II of the Federal Power Act relating to public utilities are applicable, its rate was properly reduced. Petitioner's basic contention is that Parts I and II of the Act are mutually exclusive, that it is a "licensee" under the original Federal Water Power Act (designated, as amended, as Part I of the Federal Power Act in Title II of the Public Utility Act of 1935), and hence that it cannot be a "public utility" subject to the rate regulation provisions of Part II. This claim is premised primarily on the contentions (1) that the language of Part II exempts all licensees from regulation thereunder, and (2) that the rate regulation provisions of Part II are in irreconcilable conflict with those of Section 20. Both of these contentions are without merit on the facts of this case; there is no conflict of decisions; and, notwithstanding petitioner's contentions, the record shows that, in view of the particular circumstances here involved, no questions of general importance are presented. Accordingly, we submit, further review by this Court is not warranted.

1. (a). Section 201(e) of Part II defines a "public utility" as any person who owns or operates "facilities subject to the jurisdiction of the Commission," and the effect of Section 201(b) is to subject to Commission jurisdiction all facilities for the

---

[7] The court stated: "It cannot be disputed that Safe Harbor makes such jurisdictional sales and the Commission has so found on very adequate evidence" (R. XI 4570).

transmission or sale at wholesale (*i.e.*, for resale) of electric energy in interstate commerce. Since petitioner unquestionably is the owner and operator of facilities used for the transmission and sale of electric energy at wholesale in interstate commerce, it falls squarely within Section 201's definition of a "public utility" and hence within the affirmative grant of jurisdiction to the Commission.

In addition, petitioner is not within, nor does it claim exemption under, any of the express exceptions set out in Section 201(f). Moreover, there is no basis for petitioner's suggestion that such an exception should be implied exempting licensees such as petitioner from coverage under Part II (Pet. 10). It is clear from the legislative history of Part II that Congress recognized that its definition of public utilities embraced some licensees and that it intended such licensees to be regulated as public utilities as well. Thus, the House Committee on Interstate and Foreign Commerce deleted the word "licensees" in Section 305(a)'s prohibition against personal profit by officials and left that prohibition directed solely against public utilities, because it understood that licensees owning or operating Part II jurisdictional facilities would be regulated as public utilities. The Committee commented:

> The Senate bill includes licensees within the provisions of this section, but inasmuch as such licensees when interstate operating public-utility companies will be subject to the provisions

> of the section in any event, licensees have been omitted from the bill as reported, because of the lack of public interest in those companies which are not public utilities.[8]

Dozier A. DeVane, Solicitor of the Federal Power Commission and one of the draftsmen of Part II, evidenced the same understanding. He stated at the hearings on the proposed legislation that "title II (Parts II and III of the Act) deals with operating companies" and that "among the operating companies are those companies that now have licenses from the Federal Power Commission under the Federal Water Power Act." Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st sess., on S. 1725, pp. 233-234.[9]

(b). The statement in Section 201(a), that federal regulation was to extend "to those matters which are not subject to regulation by the States,"

---

[8] H. Rep. No. 1318, 74th Cong., 1st sess., p. 31. The conference report on the bill and the Act as passed incorporated the House Committee's change. H. Rep. No. 1903, 74th Cong., 1st sess., pp. 56, 75; Section 305(a).

[9] In the first *Safe Harbor* case, petitioner conceded before the Commission "that the Commission has rate making powers under Part 2 of the Act" over the petitioner (R. V 2495, 2496). Further, the court below in the earlier case quoted the statement of the district court that "Part II, as added in 1935, gives the Commission jurisdiction over the transmission and sale of electricity at wholesale in interstate commerce, whether or not by licensees." *Safe Harbor* v. *F.P.C.*, 124 F. 2d 800, 804, fn. 4 (C. A. 3), certiorari denied, 316 U. S. 663; *Safe Harbor* v. *United States*, 37 F. Supp. 9, 10 (E.D. Pa.), appeal dismissed, 313 U. S. 546; see, also, *Niagara Falls Power Co.* v. *F.P.C.*, 137 F. 2d 787, 795 (C. A. 2), certiorari denied, 320 U. S. 792; 18 C.F.R. (1949 ed.) 35.20, 35.3 (Commission's Rules and Regulations).

does not advance petitioner's position. This language, we submit, was not directed at exempting licensees, but rather was another expression of the Congressional purpose in enacting Parts II and III of complementing state regulation by closing the regulatory gap revealed by *Public Service Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. See S. Rep. No. 621, 74th Cong., 1st sess., p. 17; H. Rep. No. 1318, 74th Cong., 1st sess., p. 7; *Jersey Central Co.* v. *F.P.C.*, 319 U. S. 61, 67-68, fn. 7. As stated by the court below, "The control of rates referred to in the section is control by a single State and the language has no relation to possible joint control by two or more States * * *" (R. XI 4576). Furthermore, none of the many references to the *Attleboro* case in the legislative history suggests that the gap to be filled by the proposed legislation was anything less than the full scope of the constitutional impotence of the States. Indeed, during the entire course of the bill through Congress, not once was it suggested, as it is now by petitioner, that the gap had already been partially filled by Congress' previous enactment of Section 20.

(c). Nor is petitioner's argument aided by the fact that public utility is defined as "any person who owns or operates facilities subject to the jurisdiction of the Commission *under this Part.*" (Emphasis added.) Petitioner's contention from this language, that it cannot be a public utility inasmuch

as its facilities are subjected to Commission jurisdiction under Part I (Pet. 10), is predicated on the erroneous assumption that regulation under Parts I and II is mutually exclusive. Once it is recognized, however, that there is no statutory barrier to a company's being both a licensee and a public utility (see *supra,* pp. 10-11), it becomes plain that the purpose of the language "under this Part" is to exclude from regulation under Part II companies, including licensees, which do not own or operate facilities for the transmission or sale for resale of electric energy in interstate commerce.[10]

2. Petitioner further contends that subjecting it to regulation under both Parts I and II will result in an irreconcilable conflict between the rate regulation provisions of these Parts which petitioner urges can only be resolved by regulating it under Part I alone. These provisions are said to have two points of conflict: first, in regard to the regulatory body possessing authority to fix rates and second, as to the standards for fixing rates. The holding below that no such conflicts exist in the circumstances of this case was, we submit, sound and accordingly the difficulties, which petitioner urges preclude its being subjected to rate regulation under both Parts, are not presented in this case.

---

[10] The same purpose underlies "The repeated and careful differentiation between 'licensees' and 'public utilities'" referred to by petitioner (Pet. 12). That differentiation does not indicate, as petitioner suggests, that a company could not be both a licensee and a public utility and so regulable under both Parts.

(a) Petitioner's claim of conflict as to regulatory body is grounded on a comparison of Section 20 of Part I with Part II. The language of Section 20 leaves regulation of rates for electric energy entering interstate commerce to the state commissions directly concerned if they can agree, with the Commission having rate regulatory authority only if the state commissions are unable to agree. On the other hand, Sections 205 and 206 of Part II vest unconditional authority in the Commission to regulate the rates of public utilities for transmission or sale for resale of electric energy in interstate commerce. While a conflict might exist if state cooperation subjected a licensee-public utility to the possibility of simultaneous regulation by state commissions under Section 20 and by the Commission under Part II (Pet. 10-11), no possibility of such conflict exists on the facts here, since the court below upheld the Commission's conclusion that Pennsylvania and Maryland, the States concerned, were unable to agree, and thus that in this case the Commission has authority to regulate petitioner's rates under Part I as well as Part II. The resolution of any such potential conflict between federal and state regulatory authority should, we submit, be deferred until actually presented.[11]

[11] When so presented, the Commission will urge that Section 20 as enacted in 1920 was intended not to sanction affirmatively state regulation of interstate transactions (cf. *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429-431), but rather to permit the states to exercise whatever power they might have over interstate rates. See,

The Commission's conclusion that the States were unable to agree is supported by ample evidence and so is conclusive. Section 313(b) of the Federal Power Act; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145-146; *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 130-131. The record shows that from late 1941 until the summer of 1944, no action was taken by the state commissions looking toward cooperative regulation, notwithstanding the fact that the Commission's order finding that Safe Harbor's rate was unreasonably high had been set aside solely on the ground that the Commission had not found that the Maryland and Pennsylvania Commissions were unable to agree. See *supra,* p. 5. Then, after the lapse of more than two years, the Maryland Commission by letter requested the Federal Commission to proceed to determine reasonable rates to be charged by Safe Harbor (R. VI 2741), *supra,* pp. 5-6. Inasmuch as the letter shows on its face that the Maryland Commission was aware that under the first *Safe*

---

e.g., Pennsylvania Gas Co. v. *Public Service Commission,* 252 U.S. 23. This Court's decision in the *Attleboro* case in 1927 indicated that the states were constitutionally without power to agree to regulate wholesale interstate rates. Accordingly, the condition of Section 20 falls and the Commission has unconditional power to regulate the wholesale interstate rates of licensees. In the alternative, the Commission will suggest that to the extent that a conflict exists, Section 20 was repealed *pro tanto* by implication by the later enactment of Part II. See *Safe Harbor* v. *F.P.C.,* 124 F. 2d 800, 804 (C.A. 3), certiorari denied, 316 U.S. 663; Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries,* 14 Geo. Wash. L. Rev. 53, 78.

Harbor decision it could regulate petitioner's rates by cooperative action with the Pennsylvania Commission, the fact that the Maryland Commission nevertheless requested the Federal Commission to regulate rates could only mean that the Maryland Commission decided against attempting such cooperation and hence that the states were "unable to agree." [12]

Moreover, the Commission's conclusion is sound even if the Maryland Commission's letter were to be read, as petitioner urges (Pet. 19), as merely indicating that no action had been taken by the state commissions looking toward cooperative rate regulation. As the court below stated (R. XI 4583):

> The Act * * * must be given a reasonable construction and one which will carry out the purpose of Congress to assure adequate and

---

[12] This letter was so explained by the Maryland Commission in its brief filed below. As quoted in the court's opinion (R. XI 4584, fn. 20), the Maryland Commission, after enumerating various problems facing it in regard to cooperative regulation with the Pennsylvania Commission, flatly stated:

> Consideration of these factors impelled the decision by the Maryland Commission that it would be impossible for it to join in cooperative regulation with the Pennsylvania Commission. Accordingly Maryland Commission requested action by the Federal Power Commission.

Among the factors enumerated was that:

> Negotiations with the Pennsylvania Commission looking toward a cooperative procedure were instituted by the Maryland Commission. But little of a tangible nature was accomplished. The interests of Maryland and Pennsylvania were in conflict.

It would only serve to delay effective regulation of petitioner's rates to set aside the Commission's order solely because the Maryland Commission did not place these conclusive statements before the Commission. Cf. R. XI 4585.

> effective regulation of wholesale rates for electric energy in interstate commerce. The Commission stated, 5 F.P.C. at pp. 232-3, that if such rates continue to be too high "inaction by the States involved, after reasonable opportunity [to cooperate in regulation] may show that they are unable to agree as certainly as formal announcement of the fact." * * * We can perceive no reason why the Commission's finding that the States of Pennsylvania and Maryland are unable to cooperate for the purposes of regulation as provided by Section 20 may not properly be bottomed on a long continued failure of States to cooperate.

Adoption of petitioner's contention that "unable to agree" means "disagree" (Pet. 14), that it requires a showing of affirmative but futile attempts of the state commissions to cooperate (Pet. 20), would mean that, if either state commission simply did nothing, the entire period of the license might run without any regulation undertaken to assure the charging of reasonable rates which Congress in Section 20 made the sole lawful rates. By ignoring this and the further fact that the failure to try to agree might be due to the belief or knowledge of one state commission that agreement on the rates could not be reached, petitioner's claim would emasculate rate regulation under Section 20.

(b) Petitioner's final claim of conflict that the rate standards of Parts I and II are irreconcilable is based on a plain misreading of Part I. It con-

tends that (1) "net investment" as defined in Section 3(13) is prescribed as the rate base [13] and (2) net investment as so defined means an undepreciated rate base, thus posing a conflict with the actual legitimate cost rate base used by the Commission in determining rates under Part II (Pet. 13, 15-17; see R. XI 4575, 4588).

(i) Part I does not impose a rate-making standard different from that of Part II. In almost identical words, both Parts prescribe the customary standard: "reasonable, nondiscriminatory, and just," [14] the type which this Court has construed

---

[13] Petitioner arrives at its claim for "net investment" as the Section 20 formula for rate regulation *via* the reference in that Section to "the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, * * *." Section 14 (dealing with "recapture") provides that before taking possession, the United States "shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken * * *."

In so far as here pertinent, Section 3(13) defines "net investment" to mean "the actual legitimate original cost thereof * * * minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: * * * (b) aggregate credit balances of current depreciation accounts, * * *."

[14] The rate standard prescribed in Section 20 provides

"* * * the rates charged and the service rendered * * * shall be *reasonable, nondiscriminatory,* and *just* to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful * * *."

Section 206(a) of Part II provides

"Whenever, the Commission * * * shall find that any rate, charge, * * * is *unjust, unreasonable, unduly discriminatory* or preferential, the Commission shall determine the *just* and *reasonable* rate, charge * * *." See, also, Sections 205(a), (b).

to free regulatory commissions from adherence to any particular formula. *F.P.C.* v. *Hope Natural Gas Co.*, 320 U. S. 591. The basis of petitioner's claim necessarily is Section 20's indirect reference to net investment. But that reference clearly imposes net investment, not as a rate base, but as a ceiling in the fixing of rates. For it provides, "no value shall be claimed * * * or allowed * * * *in excess of* the value or values prescribed in section 14 * * *," which can here be no more than net investment. Thus, whatever rate base is used, it cannot exceed net investment. Accordingly, the sole difference as to rate base between the two Parts is that Part I restricts the rate base to one not "in excess of" net investment. Such limitation is obviously not the grant of a right to licensees.[15]

(ii) Even should net investment as defined in Section 3(13) be considered as a formula for rate

[15] Neither *Niagara Falls Power Co.* v. *F.P.C.*, 137 F. 2d 787 (C. A. 2), certiorari denied, 320 U. S. 792, nor *Alabama Power Co.* v. *F.P.C.*, 128 F. 2d 280 (C.A.D.C.), supports petitioner's claim to a higher rate base than here used (Pet. 15-17). Both the *Niagara* and *Alabama* cases were decided prior to the *Hope* case. Moreover, in the *Niagara* case, the Second Circuit in its discussion of rate base used "net investment" and legitimate cost interchangeably; and its reference to Section 20 presumably indicates that it was speaking of them in terms of a maximum. 137 F. 2d at 792-793. In addition, while the court in the *Alabama* case distinguished what it regarded as the prescribed formulae of valuation for rate regulation under Parts I and II, the court plainly regarded the Part I formula as lower, rather than higher, as petitioner implicitly suggests, than Part II's. 128 F. 2d at 293. Furthermore, it may be noted that there is nothing in either the *Niagara* or *Alabama* cases supporting petitioner's construction of Section 3(13) as prescribing an undepreciated rate base. See *infra*, pp. 19-23.

regulation under Part I, there is no conflict [16] resulting from the Commission's requirement that petitioner's depreciation reserve as shown by its books be deducted.[17] Petitioner claims that under Section 3(13) its reserve for depreciation can be deducted from its rate base only to the extent, if at all, that its income remaining after deduction of operating expenses including normal depreciation expense, has been in excess of a fair return. Since only depreciation charges in the operating section of the income statement are reflected in the reserve for depreciation, petitioner's contention in effect is that it is not this normal depreciation reserve but only a special kind of a depreciation reserve accumulated out of excessive profits which is to be deducted. Under this construction a licensee could, over the entire period of its license, be entitled to rates sufficient both to recover 100% of its capital investment and to earn a return on the full investment, including the part already recovered.

In so urging, petitioner seeks to take advantage of the changed point of view toward depreciation

---

[16] The court below found it unnecessary to pass on this contention in view of its holding that net investment was not prescribed as the rate base under Part I (R. XI 4588-4589).

[17] In ordering this deduction, the Commission found that petitioner's depreciation reserve "had been accumulated from earnings in excess of a fair rate of return" (R. VI 2779, 2801), on the basis of evidence that petitioner had earned a fair return as well as depreciation accruals from the beginning of commercial operations in 1932 (see, *e.g.*, R. VII 2885-2886, 2997).

accounting between that reflected by the 1920 language of Section 3(13) and modern accounting practices. While it is customary today to deduct depreciation expense as part of operating expenses before computing net return, it was still not unusual in 1920, when the Federal Water Power Act was enacted, to determine profits without deduction for depreciation and to consider normal depreciation as coming out of "profits" instead of constituting a cost of service to be charged to operating expense. See *First Annual Report to Congress,* H. Doc. No. 242, 67th Cong., 2d sess., p. 58; Hatfield, *Modern Accounting* (1915), pp. 290-291; May, *Twenty-Five Years of Accounting Responsibility* (1936), p. 164; Mason, *Principles of Public-Utility Depreciation* (1937), p. 104. It was in light of this practice of considering depreciation expense as coming out of profits instead of operating expenses that Section 3(13) referred to the depreciation reserve as accumulated from "earnings in excess of a fair return." The testimony of Mr. O. C. Merrill (an engineer, not an accountant),[18] who assisted in the preparation of the bill which eventually became the Federal Water Power Act, makes it clear that, notwithstanding the language used,

[18] At the hearings Mr. Merrill represented the Secretaries of War, Agriculture, and Interior, who comprised the Commission under the Act as originally enacted (41 Stat. 1063). Hearings, House Committee on Water Power, 65th Cong., 2d sess., pp. 4, 5. He afterward became the Commission's first Executive Secretary. H. Doc. 242, 67th Cong., 2d sess., pp. 10-11.

(1) Section 3(13) refers to the usual, not special, depreciation charges, and (2) the provision regarding net investment was intended to assure to licensees the return of 100%, but not more, of its investment. Hearings before the House Committee on Water Power, 65th Cong., 2d sess., pp. 34-35, 41, 42-43.

Moreover, within a year after the passage of the original Act, the Commission interpreted Section 3(13) in accordance with its order here (*First Annual Report to Congress, supra,* p. 57) and has consistently followed this construction. Such long-continued administrative practice is entitled to great weight. *United States* v. *American Trucking Assns., Inc.,* 310 U. S. 534, 539; cf. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 295, 315; *Adams* v. *United States,* 319 U. S. 312, 314-315; *Edward's Lessee* v. *Darby,* 12 Wheat. 206, 210.[19]

---

[19] It is also significant that in 1935 Congress substituted "net investment" for "actual legitimate investment" in Section 10(d) of Part I to clarify the basis for setting up amortization reserves. In making this substitution, Congress construed the "net investment" definition as providing for deduction of the normal depreciation reserve. The House Committee on Interstate and Foreign Commerce so explained the amendment (H. Rep. No. 1318, 74th Cong., 1st sess., p. 24):

> In subsection (d), the provision that amortization reserves are to be established out of earnings in excess of a reasonable rate of return on the investment of the project is amended by providing that the return shall be calculated upon the net investment of the licensee in the project. This is obviously the intent of the present provision and the amendment is made merely for clarification. Earnings can only be calculated fairly upon the

In these circumstances, the Commission's reading of Section 3(13) to provide for the deduction of depreciation reserve from the rate base to the extent that the company had fully earned a fair return in addition to normal depreciation expense, and its deduction of such amount of depreciation reserve here are clearly sound. There could, therefore, be no conflict in the present case between a Section 3(13) "net investment" rate base and the rate base used by the Commission.[20]

---

total investment as reduced by retirement and the depreciation reserves, and not upon the unchanged original cost of the project.

[20] We have demonstrated that subjecting petitioner to rate regulation under Part II as well as Part I did not affect any of its substantive rights under Part I. There accordingly is no merit to petitioner's suggestion that such regulation violates the provision of Section 28 protecting licensees against subsequent alteration, amendment or repeal of the original Act (Pet. 10, 13).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

BRADFORD ROSS,
General Counsel.
HOWARD E. WAHRENBROCK,
Assistant General Counsel.
REUBEN GOLDBERG,
BERNARD A. FOSTER, JR.,
Attorneys,
Federal Power Commission.

MAY 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 883939 634